No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,
Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE THE STATES OF INDIANA, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WYOMING IN SUPPORT OF THE RESPONDENTS

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6201
**Counsel of Record*

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Special Counsel
REBECCA WALKER
Deputy Attorney General
Counsel for Amici States

(*Additional Counsel Listed on Inside Cover*)

Troy King
Attorney General
State of Alabama

Terry Goddard
Attorney General
State of Arizona

Mike Beebe
Attorney General
State of Arkansas

Charles J. Crist, Jr.
Attorney General
State of Florida

Lawrence G. Wasden
Attorney General
State of Idaho

Phill Kline
Attorney General
State of Kansas

Gregory D. Stumbo
Attorney General
State of Kentucky

Charles C. Foti, Jr.
Attorney General
State of Louisiana

Jim Hood
Attorney General
State of Mississippi

Wayne Stenejem
Attorney General
State of North Dakota

Jim Petro
Attorney General
State of Ohio

Gerald J. Pappert
Attorney General
State of Pennsylvania

Henry McMaster
Attorney General
State of South Carolina

Lawrence E. Long
Attorney General
State of South Dakota

Mark L. Shurtleff
Attorney General
State of Utah

Jerry W. Kilgore
Attorney General
State of Virginia

Patrick J. Crank
Attorney General
State of Wyoming

QUESTION PRESENTED

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI STATES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. Texas' Monument Should Be Upheld As An Encomium To Heritage, Similar To Other Ubiquitous, Benign Government Tributes To Religious Roots. 3

II. Establishment Clause Inquiry Into Government Purpose Is Unfair And Unworkable 8

A. The secular purpose test leads to unfair results, particularly when past improper purposes taint new displays having legitimate secular purposes 8

B. The purpose test has shifted over time 11

C. The purpose test's uneven application stems from its inherent unsuitability as a means of detecting "establishments" of religion 16

D. Historical displays with religious connotations should be judged only as to whether they represent actual religious coercion 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases **Page**

Allegheny v. ACLU, 492 U.S. 573 (1984) 19, 20, 21

ACLU of Ky. v. McCreary County, Ky., 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (Oct. 12, 2004) (No. 03-1693) ..... *passim*

Board of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990) 12, 14, 17

Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000) 8, 9

Bowen v. Kendrick, 487 U.S. 589 (1988) 12, 14

Edwards v. Aguillard, 482 U.S. 578 (1987) ..... *passim*

Elk Grove Unified Sch. Dist. v. Newdow, 124 S.Ct. 2301 (2004) 15

Eugene Sand & Gravel, Inc. v. City of Eugene, 558 P.2d 338 (Or. 1976) 11

Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d 247 (3d. Cir. 2003) 4

Gonzalez v. North Township of Lake County Indiana, 4 F.3d 1412 (7th Cir. 1993) 11

Indiana Civil Liberties Union v. O'Bannon, 110 F. Supp. 2d 842 (S.D. Ind. 2000). 6, 10

Cases **Page**

Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002) 9, 10, 11

Kreisner v. San Diego, 1 F.3d 775 (9th Cir. 1993) 11

Lemon v. Kurtzman, 403 U.S. 602 (1971) 12, 14

Lynch v Donnelly, 465 U.S. 668 (1984) ..... *passim*

Marsh v. Chambers, 463 U.S. 783 (1982) 20

McGowan v. Maryland, 366 U.S. 420 (1961) 15

Modrovich v. Allegheny County, 385 F.3d 397 (3d. Cir. 2004) 3, 4

Mueller v. Allen, 463 U.S. 388 (1983) 13, 14

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 14, 15, 16

State v. Freedom From Religion Found., Inc., 898 P.2d 1013 (Colo. 1995) 8

Stone v. Graham, 449 U.S. 39 (1980) 13, 16, 21

Wallace v. Jaffree, 472 U.S. 38 (1985) 12, 13, 15

Widmar v. Vincent, 454 U.S. 263 (1981) 13

Zorach v. Clausen, 343 U.S. 306 (1952) 20

Constitutional Provisions **Page**

U.S. Const. Amend. I (Establishment Clause) ..... *passim*

U.S. Const. Amend. XIV (Equal Protection Clause) 18

Other Authorities **Page**

Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87 (2002) 19

Architect of the Capitol, *Works of Art in the Capitol Complex*, *at* http://www.aoc.gov/cc/cc_art.htm (last visited November 30, 2004). 6, 7

Architect of the Capitol, *Works of Art in the Capitol Complex, at* http://www.aoc.gov/cc/art/nsh/index.cfm (last visited Nov. 30, 2004) 7

Architect of the Capitol, *Works of Art in the Capitol Complex, at* http://www.aoc.gov/cc/art/lawgivers/lawgivers.cfm (last visited Nov. 30, 2004) 7

C.W. Short & R. Stanley-Brown, *Public Buildings, Architecture Under the Public Works Administration 1933 to 1939* 141 (1939) 7

Francis Morrone, *Statues and Civic Memory*, City J. (Summer 1999), *available at* http://www.city-journal.org/html/9_3_urbanities_statues.html (last visited Nov. 30, 2004) 4

Francisco Pio Ruggiero, *State Capitols: Temples of Sovereignty* 140 (2002). 6

Other Authorities **Page**

Gilgal Garden, *History of Gilgal Garden*, *at* http://www.mediadivide.org/gilgal/history.html (last visited Dec. 7, 2004) 5

Hal Culbertson, Note, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. Ill. L. Rev. 915 (1990).....19

Hawaii.com, *Hawaii State Capitol Building*, *at* http://www.hawaii.com/visit/details.php?id=329&type=attractions (last visited Nov. 30, 2004). 4

Honolulu, *Foster Botanical Garden Master Plan*, *at* http://www.co.honolulu.hi.us/parks/facility/foster/index1.htm (last visited Nov. 30, 2004). 4

Human Events Online, *Exclusive Photo Essay: God in the Temples of Government*, *at* http://www.human eventsonline.com/article.php?id=2441 (last visited Nov. 30, 2004). 6, 7

Inetours.com, Tour San Francisco, *The Japanese Tea Garden in San Francisco's Golden Gate Park*, *at* http://www.inetours.com/Pages/SFNbrhds/Japanese_Tea_Garden.html (last visited Nov. 30, 2004). 5

Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993).....18

Other Authorities **Page**

Minnesota Jud. Branch, Sup. Ct., *Minnesota Supreme Court*, *at* http://www.courts.state.mn.us/documents/CIO/otherResources/Supreme Court.doc.....4

Minnesota State Capitol Bldg., *at* http://www.minnesotabound.com/visit/Capitol/ (last visited Nov. 30, 2004). 4

Old Economy Village, *at* http://www.oldeconomy village.org (last visited Nov. 30, 2004).....7

Oroville Parks and Trees Dep't, *Oroville Chinese Temple*, *at* http://www.cityoforoville.org/Parks/ChineseTempleHistory.html (last visited Nov. 30, 2004).....5

Pat Costello, Photo of the Mural on City Hall, Sept. 15, 2000, *at* http://www.juneauphotos.com/index.asp?r=605 (last visited Nov. 30, 2004).. 5

Petition for Writ of Certiorari filed Dec. 28, 2001, in *O'Bannon v. Indiana Civil Liberties Union*, No. 01-966, 71a-74a, *cert. denied*, 534 U.S. 1162 (2002).....5

Russell Kirk, *The Roots of American Order* 38 (1974). 8

St. Louis, Dep't of Parks, Recreation and Forestry, *St. Louis City Parks Ornamental Structures and Fountains*, *at* http://stlouis.missouri.org/citygov/parks/parks_div/facilities/fountains.html (last visited Nov. 30, 2004).....5

Sara Evans Barker, *The Rule of Law*, Traces of Ind. and Midwestern Hist., Summer 2003, at 4.....6

Other Authorities **Page**

Sean Scully, *Ventura Faces Suit over Park's Cross*, Wash. Times, Apr. 14, 2003, *available at* http://www.papillonsartpalace.com/venrtura.htm (last visited Nov. 30, 2004).....5

Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987).....14, 15, 18

TravelJuneau.com, *Juneau Downtown Area Map*, *at* http://www.traveljuneau.com/discover/maps/downtown/downloads/juneau.pdf (last visited Nov. 30, 2004).....4, 5

U.S. Dist. Ct., Dist. of Columbia, *History of E. Barrett Prettyman Federal Courthouse*, *at* http://www.dcd.uscourts.gov/court-history.html (last visited Nov. 30, 2004).....6

INTEREST OF THE AMICI STATES

The State of Indiana submits this brief on behalf of itself and 17 other *amici* states in support of Texas and the decision below upholding the constitutionality of Texas' Ten Commandments display. Texas' monument, like other existing and proposed Ten Commandments displays around the country, is a tribute to a seminal part of our Nation's history and civilization, particularly with respect to the rule of law. The Court's decision in this case, as well as its decision in *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (Oct. 12, 2004) (No. 03-1693), will have a direct impact on the continued viability of thousands of government Ten Commandments monuments that have become fixtures of statehouse and courthouse lawns around the country, as well as on the permissibility of future or replacement displays.

Doubtless the ruling here will also have a substantial impact on other government commemorations of religious heritage. State and local governments frequently erect monuments, hang plaques, and maintain frescos and murals to celebrate local and national history and culture, including events and ideas rooted in religion. Such tributes remind citizens and newcomers alike of where we came from and what our forebears valued. It is not too much to say that, regardless of individual creed, such knowledge is critical to understanding who we are *now* as a people—as Americans, Texans, Kentuckians, Hoosiers, Alabamians or citizens of wherever we live.

The *amici* States thus have a compelling interest in defending their ability to commemorate all aspects of their heritage, from the battles to gain and preserve liberty, to the roots (religious or otherwise) of liberty, the rule of law, and other social values. The Court should uphold Texas' monument, as well as the display at issue in *McCreary County*, to ensure that religious heritage is not banished from the public square.

SUMMARY OF THE ARGUMENT

Throughout the United States, state and local governments have incorporated into their buildings, grounds and parks various displays, monuments, statues, paintings, and other artistic expressions that have both religious and secular meaning. These displays exist as a part of an overall education of the foundations of our governments and culture. Such displays are not intended to declare official religious doctrine, nor is anyone likely to mistake them for such. Our republic has a rich tradition of displaying representations of our religious heritage. Such displays are everywhere. Surely, no reasonable person could say that the cumulative effect of these displays has been to advance religion, to establish a church or religious orthodoxy, or to coerce individuals into espousing particular religious views. There is nothing about Ten Commandments displays, new or old, that threatens a tipping point of official religious sanction or indoctrination.

Using the secular purpose test to evaluate government displays of the Ten Commandments and other symbols of religious heritage has led to inconsistent, frustrating and ultimately inequitable results. Governments having substantially identical displays often see disparate outcomes simply because an official statement or the participation of clergy at a dedication ceremony years or decades earlier are adjudged in hindsight to have conveyed a purpose of advancing religion. It is especially objectionable that the inference of impropriety a court might draw under such circumstances can forever taint future displays in that jurisdiction, regardless of changes in public officials or the development of new secular purposes. The Establishment Clause surely does not require such results, and indeed many problems with the purpose test arise because it lacks a sound connection to Establishment Clause values.

The Court should discard the purpose test entirely, and at the very least clarify that an improper purpose at one time does not taint future displays. A better approach for evaluating government displays having both religious and secular meaning is to ask whether the display is actually coercive.

ARGUMENT

I. Texas' Monument Should Be Upheld As An Encomium To Heritage, Similar To Other Ubiquitous, Benign Government Tributes To Religious Roots

Texas' Ten Commandments monument, donated by the Fraternal Order of Eagles in 1961, is hardly unusual as a government tribute to a heritage with religious origins. Indeed, displaying monuments to history that also have religious meaning has a long and rich tradition in America at all levels of government. Without including such displays among representations of other cultural symbols and markers, governments would leave obvious, yawning gaps in their historical narratives. The Establishment Clause surely does not demand incomplete, censored or revisionist depictions of history.

1. Many state and local government buildings have erected Ten Commandments monuments donated by the Fraternal Order of Eagles. As explained in more detail in the *amicus* brief of Alabama and other states filed in *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (Oct. 12, 2004) (No. 03-1693), during the 1950's and 1960's, the Eagles donated thousands of such monuments to state and local governments across the country. For decades there have also been many non-Eagles Ten Commandments displays on public lands around the country, some of which have only recently been subjected to litigation. *See, e.g., Modrovich v. Allegheny County*, 385 F.3d 397 (3d.

Cir. 2004); *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d. Cir. 2003).

The Supreme Court Chambers in the Minnesota State Capitol has a painting depicting Moses receiving the Ten Commandments. *See* Minn. Jud. Branch, Sup. Ct., *Minnesota Supreme Court*, *at* http://www.courts.state.mn.us/documents/CIO/otherResources/SupremeCourt.doc (last visited Dec. 6, 2004). Other pieces of art within the Minnesota State Capitol have religious themes as well, including a painting of Saint Anthony at Saint Anthony Falls. *See* Minn. State Capitol Bldg., *at* http://www.minnesotabound.com/visit/Capitol/(last visited Nov. 30, 2004). On the outside of the New York State Supreme Court building, there are nine full-sized statues, including Moses, Confucius, and Solon. A figure of Muhammad was included until the early 1950's when it was removed at the request of Muslim nations. Francis Morrone, *Statues and Civic Memory*, City J. (Summer 1999), *available at* http://www.cityjournal.org/html/9_3_urbanities_statues.html (last visited Nov. 30, 2004).

2. State and local governments also display monuments to culture that have a wide variety of other religious origins and references. Outside of Hawaii's State Capitol stands a statue of Father Damien deVeuster, a Belgian Catholic Priest who was the martyr of Kalawao, Moloka'i and who devoted his life to helping sufferers of Hansen's Disease (leprosy) before succumbing to the disease himself. *See* Hawaii.com, *Hawaii State Capitol Building*, *at* http://www.hawaii.com/visit/details.php?id=329&type=attractions (last visited Nov. 30, 2004). Honolulu's publicly owned Foster Botanical Garden includes a sculpture of a sitting Buddha. *See* Honolulu, *Foster Botanical Garden Master Plan*, *at* http:// www.co.honolulu.hi.us/parks/facility/foster/index1.htm (last visited Nov. 30, 2004). In Alaska, the Juneau Municipal Building features a mural based on the Tlingit religion's legend of the creation of

mankind. *See* TravelJuneau.com, *Juneau Downtown Area Map*, *at* http://www.traveljuneau.com/discover/maps/downtown/downloads/juneau.pdf (last visited Nov. 30, 2004); Pat Costello, Photo of the Mural on City Hall, Sept. 15, 2000, *at* http://www.juneauphotos.com/index.asp?r=605 (last visited Nov. 30, 2004).

Throughout California many crosses stand on public land. Sean Scully, *Ventura Faces Suit over Park's Cross*, Wash. Times, Apr. 14, 2003, *available at* http://www. papillonsartpalace.com/venrtura.htm (last visited Nov. 30, 2004). In recent years federal courts have ordered some to be removed, but many remain. *Id.* In Oroville, California, a Chinese Temple once used for worship sits in a city garden and is a California Registered Historical Landmark. *See* Oroville Parks and Trees Dep't, *Oroville Chinese Temple*, *at* http://www.cityoforoville.org/Parks/ChineseTempleHistory.html (last visited Nov. 30, 2004). Golden Gate Park features a statue of Buddha in its Japanese Tea Garden. *See* Inetours.com, Tour San Francisco, *The Japanese Tea Garden in San Francisco's Golden Gate Park*, *at* http://www.inetours.com/Pages/SNFbrhds/Japanese_Tea_Garden.html (last visited Nov. 30, 2004).

A Salt Lake City park, the Gilgal Garden, features many sculptures and stoneworks that reflect Church of Jesus Christ of the Latter Day Saints themes. Gilgal Garden, *History of Gilgal Garden*, *at* http://www.mediadivide.org/gilgal/history.html (last visited Dec. 7, 2004). In St. Louis' Forest Park stands both a Jewish First American Settlement Commemorative Monument and a St. Francis of Assisi Statue in memory of Harry Turner, one of the first automobile dealers in St. Louis. *See* St. Louis, Dep't of Parks, Recreation and Forestry, *St. Louis City Parks Ornamental Structures and Fountains*, *at* http://stlouis. missouri.org/citygov/parks/parks_div/facilities/ fountains.html (last visited Nov. 30, 2004). The Pennsylvania Capitol rotunda contains the treasured medallion

"Religion," and in the South Dakota Supreme Court, the mural "Mercy of the Law" depicts an angel guarding over the legal process. Francisco Pio Ruggiero, *State Capitols: Temples of Sovereignty* 140, 532 (2002).

3. As detailed in the *amicus* brief filed by Alabama and other states in the *McCreary County* case, several federal government buildings also display representations of the Ten Commandments, including some at the Supreme Court itself. Another notable federal courthouse depiction of Moses's role in American law is at the E. Barrett Prettyman courthouse in Washington D.C., where four large sculptures of historically significant lawgivers, including Moses, sit behind the bench in one of the courtrooms. *See* U.S. Dist. Ct., Dist. of Columbia, *History of E. Barrett Prettyman Federal Courthouse*, *at* http://www.dcd.us courts.gov/court-history.html (last visited Nov. 30, 2004). And, ironically, located over the bench in the very courtroom where a federal district court heard arguments concerning a proposed Indiana Statehouse lawn Ten Commandments monument is a mural depicting, among other things, a figure holding the Ten Commandments. *See* Sara Evans Barker, *The Rule of Law*, Traces of Ind. and Midwestern Hist., Summer 2003, at 4; *Ind. Civil Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842, 851-52 (S.D. Ind. 2000).

Federal buildings also display other religious symbols as tributes to our country's heritage. In the U.S. Capitol, for example, there is a stained glass window depicting George Washington praying. *See* Human Events Online, *Exclusive Photo Essay: God in the Temples of Government*, *at* http://www.humaneventsonline.com/article.php?id=2441 (last visited Nov. 30, 2004). The Capitol's artwork includes paintings of De Soto's discovery of the Mississippi River and his burial, both of which display religious symbols such as the crucifix. *See* Architect of the Capitol, *Works of Art in the Capitol Complex*, *at* http://www.aoc.gov/cc/cc_art.htm (last

visited November 30, 2004). The Capitol also displays statues of Jacques Marquette, a Jesuit missionary from the seventeenth century, Brigham Young, president of the Mormon Church during its western colonization, and Thomas Starr King, a nineteenth century Unitarian minister. *See id. at* http://www.aoc.gov/cc/art/nsh/index.cfm. Relief portraits of Moses, medieval pope Gregory IX, and Jewish theologian Maimonides are included among the Capitol's twenty-three portraits of lawgivers who are considered to have established the principles that underlie American law. *See id.* at http://www.aoc.gov/cc/art/lawgivers/lawgivers.cfm. And the Library of Congress displays religious paintings and Biblical quotations on its walls. *See* Human Events Online, *at* http://www.humaneventsonline.com/article.php?id=2441.

During the Great Depression the Public Works Administration built or repaired numerous historical sites reflecting religious themes. For example, the PWA restored a church and other buildings in Old Economy Village, a religious communal society founded by the Harmony Society in Pennsylvania, and today the village is a national historic landmark. *See* C.W. Short & R. Stanley-Brown, *Public Buildings, Architecture Under the Public Works Administration 1933 to 1939* 141 (1939); Old Economy Village, *at* http://www.oldeconomyvillage.org (last visited Nov. 30, 2004). The PWA also restored a mission church at the Tumacacori National Monument. Short & Stanley-Brown, *supra*, at 152. These projects and sites have served the important secular purpose of inculcating new generations with American history, not the purpose of inculcating religion.

* * *

As it ponders the permissibility of the Ten Commandments displays in this case and in *McCreary County*, the Court should consider the important American tradition of erecting monuments to our history, including the role of religion. This

tradition quite obviously does not seek to advance religion; it seeks instead to preserve and tell the stories of who we are as a people and the foundations of our social and political cultures. It serves an important secular purpose for government to convey this historical perspective to all citizens, regardless of belief. And the Ten Commandments are most certainly a part of our heritage: "[S]uch are the Hebraic roots of American order, whether or not the reader of this book wholly accepts the Law and the prophets." Russell Kirk, *The Roots of American Order* 38 (1974).

II. Establishment Clause Inquiry Into Government Purpose Is Unfair and Unworkable

A. The secular purpose test leads to unfair results, particularly when past improper purposes taint new displays having legitimate secular purposes

One reason that Texas' Ten Commandments monument survives scrutiny under the endorsement test is that the record contains no evidence demonstrating that Texas officials accepted the monument with religious objectives in mind. (Pet. App. 9-12) That history, combined with the well-established understanding that the Ten Commandments have had a dramatic impact on Western (in particular American) secular political culture, means that the Texas display survives scrutiny under the "secular purpose" inquiry of the endorsement test. (*See id.*) An identical Fraternal Order of Eagles monument on Colorado's State Capitol grounds also has a legitimate secular purpose. *State v. Freedom From Religion Found., Inc.*, 898 P.2d 1013, 1023-24 (Colo. 1995).

Other local governments displaying identical Ten Commandments monuments donated by the Eagles have not been as fortunate with respect to their historical records. In *Books v. City of Elkhart*, 235 F.3d 292, 303-04 (7th Cir. 2000), for example, the court determined that Elkhart had accepted the

Eagles monument in 1958 with an improper religious purpose in mind because clergy had spoken at the dedication ceremony. The court also ruled that the Elkhart City Council's effort to purify its purpose by passing a resolution declaring that the monument should continue to be displayed on city grounds for secular historical reasons was a sham and could not overcome the improper objectives of public officials long passed from the scene. *Id.* at 304.

Thus, with respect to identical Ten Commandments monuments, two governments are permitted to display their monuments, while a third is prohibited from doing so, all because of what some public officials and clergy said forty or more years ago. The *McCreary County* case further complicates matters by not permitting public officials to overcome past improper objectives with statements of purely secular purposes concerning a *new* Ten Commandments display adorned with additional historical documents and symbols. *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438 (6th Cir. 2003), *cert. granted*, 125 S.Ct. 310 (Oct. 12, 2004) (No. 03-1693).

Indiana's experience adds yet another dimension to the unfairness produced by the purpose test. From 1958 until 1991, when a vandal spray-painted and then toppled it, an Eagles Ten Commandments monument stood without challenge on the Indiana Statehouse lawn—a lawn that also features twelve other historical markers and monuments, as well as seven dedicated trees. Several years after this vandalism, several Indiana limestone companies donated a replacement monument that featured not only the Ten Commandments, but also the Bill of Rights and the Preamble to the Indiana Constitution. *Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001), *cert. denied*, 534 U.S. 1162 (2002).

In a March 14, 2000, press release explaining why he was accepting the replacement monument for the Statehouse lawn, the late Indiana Governor Frank O'Bannon remarked that the new monument was intended to "be an integral part of the Statehouse setting, which honors the history of our state and nation." *Id.*[1] However, the Governor also stated that the vandalized monument donated by the Eagles had "stood on the Statehouse lawn as a reminder of some of our nation's core values." *Id.* The district court and the Seventh Circuit inferred that the Governor's "core values" characterization of the *prior* monument related to *religious* core values (as opposed to the core values of liberty and law), and furthermore inferred that the Governor had "primarily" a religious purpose in mind, rather than his stated secular purpose, when he accepted the *new* monument. *Id.* at 772; *Ind. Civil Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842, 851-52 (S.D. Ind. 2000), *aff'd*, 259 F.3d 766, 773 (7th Cir. 2001).

Thus, assuming the Court upholds, as it should, Texas' Eagles monument, but also affirms, as it should not, the Sixth Circuit's use of the secular purpose rule to hold the *McCreary County* display irremediably tainted, Indiana may be frustrated in erecting any new Ten Commandments display just because nearly five years ago a twice-succeeded Governor referred to a prior display—identical to Texas'—as a statement of "core values." Adding insult to injury is the fact that the Governor had occasion to accept the new monument only because one of the plaintiffs in that case vandalized the State's prior Ten Commandments display. As with the experience of McCreary County, even the possibility of such a

---

[1] For the full text of Governor O'Bannon's press release, see Petition for Writ of Certiorari filed Dec. 28, 2001, in *O'Bannon v. Indiana Civil Liberties Union,* No. 01-966, 71a-74a, *cert. denied,* 534 U.S. 1162 (2002).

result demonstrates the unfair and absurd outcomes that can follow from the purpose test.

Nor is this problem limited to cases involving Ten Commandments monuments. For example, in *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 349 (Or. 1976), the court permitted a city park to display a large cross because, notwithstanding any earlier improper purposes, a new secular purpose had emerged to justify its display. But in *Gonzalez v. North Township of Lake County, Indiana*, 4 F.3d 1412, 1414-15, 1421 (7th Cir. 1993), the court rejected a city park's claim that it was displaying, as a war memorial, a crucifix donated by the Knights of Columbus because a Knights spokesperson (not a public official) had referred to the cross in religious terms twenty-eight years earlier. Because of the purpose test, once again, one government may display a religious symbol for secular reasons, while another may not.

B. The purpose test has shifted over time

One failure of the purpose test has been its inconsistent application. In many cases the Court has been highly deferential to government defendants' stated secular purposes, while in others it has been far more skeptical of those assertions. The result is confusion about exactly what scrutiny lower courts should undertake when applying the purpose test. *Compare O'Bannon*, 259 F.3d at 771-72 (rejecting the Governor's asserted secular purpose because the court doubted whether it was the primary purpose), *with Kreisner v. San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (deferring to the city because it claimed at least one secular purpose). Unless the Court scraps or modifies the purpose test here or in *McCreary County*, this inconsistency, and the uncertainty for state and local governments that it creates, will likely persist.

1. To begin, in *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), the Court accepted the government's asserted secular purposes because such claims must "be accorded appropriate deference." In *Lynch v. Donnelly*, the Court observed that it "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was *motivated wholly* by religious considerations." 465 U.S. 668, 680 (1984) (citations omitted) (emphasis added). After observing that the "narrow question is whether there is *a* secular purpose for Pawtucket's display of the crèche," the Court took Pawtucket at its word that it sponsored the display to "celebrate the Holiday and to depict the origins of that Holiday." *Id.* at 681 (emphasis added). Notably, the Court held "only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires" and specifically disclaimed Pawtucket's need of an *exclusively* secular purpose. *Id.* at 681 n.6.

The Court has reaffirmed this deferential approach. In *Bowen v. Kendrick*, 487 U.S. 589, 603-04 (1988), the Court sided with the government because, even if the Adolescent Family Life Act "was motivated in part by improper concerns, the parts of the statute to which appellees object were also motivated by other, entirely legitimate secular concerns." Similarly, in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 249 (1990), a plurality of the Court agreed that the Equal Access Act's religious activity protections were justified by the secular purpose of preventing speech discrimination notwithstanding that some legislators may have wanted to protect religious speech in particular: "[W]hat is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *See also Wallace v. Jaffree*, 472 U.S. 38, 56

(1985) (observing that even "a statute that is motivated in part by a religious purpose" may be valid).[2]

This line of cases yields a relatively light standard whereby "the Court is "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned . . . ." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Yet this has not been the operative consideration in all cases.

2. The Court has at times undertaken a more searching analysis and attempted to look behind the plausible or stated purposes of government action to discern the government's supposed *actual* purposes. The Court has also employed a comparative test whereby it attempts to discern the *primary* purpose for governmental action supported by both religious and secular purposes.

In *Stone v. Graham*, 449 U.S. 39, 41 (1980), for example, the Court rejected the asserted secular purpose behind posting the Ten Commandments on public school classroom walls, saying that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." The Court arrived at this conclusion notwithstanding its acknowledgement that the Ten Commandments may be part of a public school curriculum for multiple secular reasons. It simply chose not to defer to the government's asserted secular purpose.

---

[2] *Widmar v. Vincent*, 454 U.S. 263 (1981), is instructive as well. The Court held that providing religious groups with access to a state university's open forum would be permissible because doing so "would have a secular purpose." *Id.* at 271 & n.10. This implies that any improper purposes that administrators might also have would be irrelevant.

Similarly, in *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987), the Court accepted the notion that states could require public schools to teach creation science under the pure secular purpose of promoting skeptical inquiry. Nonetheless, the Court second-guessed Louisiana's stated secular purpose for its creation-science law because, based on a few comments by the legislative sponsor, it deemed the Act's "primary purpose" to be endorsement of religious laws. *Id.* at 592-94. Thus, notwithstanding the availability of a plausible secular purpose, the Court chose to look behind the statute to discern the "primary" purpose. The Court even listed in detail possible sources of information for discerning the primary purpose behind assertedly secular legislation in future cases. *Id.* at 593-94. This approach evinces a skeptical attitude that is far different from the deferential approach of *Lemon*, *Lynch*, *Bowen*, *Mergens* and *Mueller*.

Finally, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Court rejected a public school's stated secular purpose for permitting a student message or invocation at football games. The school policy declared that the purpose was to solemnize the event, and the Court acknowledged that this purpose was "entitled to some deference." *Id.* at 306, 308. Nonetheless, the Court ultimately concluded that, because prayer is the most obvious way to solemnize an event, because the policy specifically permitted an "invocation," and because the school had a prior policy of permitting student-led prayer at football games, the "specific" purpose of the policy must have been to preserve a religious practice. *Id.* at 309. Particularly significant in *Santa Fe* was the Court's assertion that these factors made it "reasonable" to infer that a religious purpose underlay the policy. *Id.*

Thus, while *Mueller* ruled that the Court should be reluctant to second-guess a plausible secular purpose, *Santa Fe* ruled that the Court could do so as long as it was merely

"reasonable" to infer that a religious purpose may have existed. As professor Steven Smith has written, "[i]t is far from clear how a court can be expected to distinguish sham purposes from sincere ones when it is also required to 'defer to . . . stated intent.'" Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 286 (1987) (quoting *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring)).

3. Even the "taint" doctrine, which leads to the unfair results recounted in Part II.A, *supra*, is part of the secular purpose rule's problematic metamorphosis.

As mentioned, the Court in *Santa Fe* ascribed religious purposes to an assertedly secular school policy in part because the policy at one time had provided for student-initiated prayer. *Santa Fe*, 530 U.S. at 309. But obsessive focus on long-ago stated purposes and the history surrounding prior displays deviates substantially from the Court's earlier understanding of the purpose test. In particular, in *McGowan v. Maryland*, 366 U.S. 420, 444-47 (1961), the Court upheld Maryland's Sunday closing laws because, regardless of the religious origins of such laws, a secular justification had emerged over time. *Id. See also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 2301, 2325 (2004) (O'Connor, J., concurring) (stating that even if some legislators voted to add "under God" to the Pledge of Allegiance out of religious motivations, "[a]ny religious freight the words may have been meant to carry originally has long since been lost.").

If the Court chooses to preserve the purpose test, it should make clear that the *McGowan* approach applies and that prior improper religious purposes do not taint present secular purposes justifying the same activity, particularly where new government officials are now in place. Limiting the secular purpose test to the question of whether the government action

could be justified by any reasonable secular purpose would accomplish that objective. *See Lynch*, 465 U.S. at 681 n.6. So would clarifying that government officials may reconstitute their purposes over time. Only through these modifications can the Court preserve the purpose test and also provide for equal justice across jurisdictions.

C. The purpose test's uneven application stems from its inherent unsuitability as a means of detecting "establishments" of religion

The Court's varying applications of the purpose test reflect the extraordinary difficulty of applying the test and, more to the point, the test's vulnerability to manipulation (even if unintentional) and its inherent inability to provide equal justice over time. These are systemic problems that follow from the lack of a well-understood connection with the values underlying the Establishment Clause.

1. The most obvious difficulty in applying the secular purpose test (as understood in, *e.g.*, *Stone*, *Edwards*, and *Santa Fe*) is to divine the supposed actual or prevailing purpose of a government official or body. Judges applying the purpose test probe deep into a government body's political culture, legislative history, interpretations and statements regarding the law, historical context, and even the fit between the act and its secular ends. The objective is to unravel an infinite variety of complementary, intertwined purposes and determine not just what they are, but which among them is "primary."

That judges undertake to determine whether the articulated secular purposes of public officials (who are equally under oath to uphold the Constitution) are nothing but a "sham" implies institutional distrust and deeply offends comity. *Edwards*, 482 U.S. at 586-87; *see also id.* at 610 (Scalia, J., dissenting) ("[T]he Court today holds . . . that the members of

the Louisiana Legislature knowingly violated their oaths and then lied about it."). That courts often must grope for the actual purposes of entire legislative bodies and not just individual government officials turns the implausible into the futile. *Id.* at 637 (Scalia, J. dissenting) ("To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist."). It is inherently unjust for constitutionality to turn on a single legislator's (or government executive's) ill-conceived comment in support of a law or a display, as if the resulting law were the "fruit of a forbidden tree." *Id.* at 638.

A plurality of the Court may have backed away from such an incredulous approach in *Mergens*, where the Court upheld the Equal Access Act notwithstanding the religious motivations of some who voted for it. *Mergens*, 496 U.S. at 249. But even the *Mergens* plurality ultimately reasoned that having a religious *motivation* is distinguishable from having a *purpose* of advancing religion. *Id.*; *but see*, *e.g.*, *Lynch*, 465 U.S. at 680 (articulating the purpose test in terms of motivations). The supposed distinction is that, while the Establishment Clause prohibits government from advancing religion, it does not enjoin government officials from pursuing secular policies from religious motives. *See Edwards*, 482 U.S. at 614-15 (Scalia, J., dissenting) (contrasting cases that speak of activities "endorsing," "advancing," or "establishing" religion from secular policies pursued for religious motives, such as providing for the homeless).

Requiring courts to find a blurry line between the two is yet another impediment to principled, consistent adjudication. Indeed, if courts fail to draw the motive/purpose distinction accurately, the purpose test may ultimately result in judicial decisions that effectively exclude the religious from political participation. *See id.* Regardless, the purpose test is laden with entirely subjective inquiries, making it highly susceptible to unequal applications.

2. The impossibility of applying the secular purpose test with objectivity and consistency rests in part on its questionable jurisprudential rationale. "It is . . . far from an inevitable reading of the Establishment Clause that it forbids all governmental action intended to advance religion; and if not inevitable, any reading with such untoward consequences must be wrong." *Edwards*, 482 U.S. at 639 (Scalia, J., dissenting). The endorsement test as a whole has been derived from the notion that the Establishment Clause exists in part to prevent religious minorities from feeling like "outsiders." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The implicit theory for including a secular purpose component appears to be that, regardless of the effect of government action, the mere existence of a religious purpose alone can somehow exclude or create outsiders.

Even aside from the conceptual riddle of how a religious purpose can exclude when the effect does not, the Establishment Clause roots of the "outsider" premise are far from clear. For example, Steven Smith writes that the Establishment Clause had once been "primarily concerned with maintaining proper institutional relations." Smith, *Symbols*, *supra* at 299. He describes the "outsider" premise as reconceiving the Establishment Clause as a source of individual rights rather than as a regulator of institutional relations. *Id.* Professor Michael Paulsen has argued that, even if intended to advance religion, if government action has no religiously coercive impact, "the Establishment Clause supplies no justification for outlawing it," and therefore "[t]he purpose prong of *Lemon* thus serve[s] no legitimate function . . . ." Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795, 803 (1993). In light of the secular purpose test's rather shaky jurisprudential foundation, it is no wonder that enforcement

varies so wildly: Courts are likely unsure what the doctrine is ultimately trying to achieve.[3]

D. Historical displays with religious connotations should be judged only as to whether they represent actual religious coercion

Particularly because the purpose test suffers from deep and insoluble practical problems leading to unjustified disparate treatment of similar government displays, the Court should, with respect to display cases at least, move toward a standard with firmer constitutional footing and clearer criteria. Doing so would not only result in greater equality across jurisdictions, but it would also provide government officials with more predictable outcomes.

In *McCreary County*, the *amici curiae* brief of Alabama and other states proposes that, with respect to Establishment Clause challenges to government displays, the Court should

---

[3] Nor can the secular purpose test be justified by reference to the use of an at-least-nominally similar test in Equal Protection cases. *See, e.g.*, Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 118 (2002) (supporting purpose test, but stating that "[t]he basic premises of democracy condemn a political process in which the decisionmakers are racist, but not a political process in which some of the decisionmakers have religious views and allow those views to influence their political positions"); Hal Culbertson, Note, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. Ill. L. Rev. 915, 942 (1990) ("[N]either the participation of religious persons nor the use of religious rhetoric creates a constitutional flaw in the political process. Simply put, pure motivation analysis is not justified by political process theory and should be abandoned in establishment clause jurisprudence.").

discard the endorsement test entirely and consider employing instead the coercion test proposed by Justice Kennedy in his *Allegheny* opinion. *Allegheny v. ACLU*, 492 U.S. 573, 659-63 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part) (describing parameters of coercion test). Here the *amici* states provide an additional rationale for applying the coercion test to government displays.

The Court has understood the Establishment Clause to permit government traditions having religious significance because of its appreciation for the secular dimensions and common acceptance that also characterize those traditions. *Marsh v. Chambers*, 463 U.S. 783, 792 (1982), in particular, ruled that legislatures may hire a chaplain to conduct legislative prayer because Congress and state legislatures have engaged in that practice throughout our history.

Similarly, the "common sense of the matter" permits the Court to open its sessions with "God save the United States and this Honorable Court" and for the currency to bear the motto "In God We Trust." *Zorach v. Clausen*, 343 U.S. 306, 312-13 (1952); *see also Marsh*, 463 U.S. at 792; *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (stating that the "history and ubiquity" of practices with religious significance enables them to convey a message related to common secular culture rather than religion). Moreover, *Marsh* ruled that a government's "tolerable acknowledgement of beliefs widely held among the people of this country" will not offend the Establishment Clause. *Marsh*, 463 U.S. at 792.

As set forth in Part I, *supra*, and in the *amici curiae* brief of Alabama and other states in *McCreary County*, state and local governments all over the country have a long and rich tradition of displaying tributes to our religious roots and heritage, including the Ten Commandments. For these reasons, the coercion test can safely be used in government display cases as a safeguard against presentations that go too

far. As long as the display, new or old, does not "coerce anyone to support or participate in any religion or its exercise," it should be permitted under the Establishment Clause. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).

As for analyzing the display at issue here, Texas' monument easily passes both the endorsement test and the coercion test. It satisfies the purpose test because there is no evidence that Texas officials had the purpose of advancing religion when they accepted or dedicated it, and it satisfies the effects test as a mere "passive acknowledgement" of the role of the Ten Commandments in society and as a type of government activity "accepted in our national heritage." *See id.* at 663 (Kennedy, J., concurring in the judgment in part and dissenting in part). Nor, for largely the same reasons, does the monument in any way coerce participation in religion or its exercise—it does not even have a captive audience as in *Stone*. Texas' monument survives any plausible test the Court may apply to it.

* * *

Our Founders created secular government and disestablished religion, but their own religious learning in general, and the Ten Commandments in particular, profoundly influenced those Founders and ultimately the endurance of the Republic. Texas' Ten Commandments display—set among numerous markers honoring the history of Texas and the Nation—merely commemorates the profound historical influence of the Commandments. Like nearly all government tributes to religious heritage, it is fully consonant with the First Amendment: It coerces nobody, creates no impression of religious endorsement, and belongs to a government tradition with rich secular significance. To enjoin government recognition of the role of the Ten Commandments in our culture is to enjoin an accurate portrayal of the very wellsprings of our history.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204
(317) 232-6201

**Counsel of Record*

STEVE CARTER
Attorney General
THOMAS M. FISHER*
Special Counsel
REBECCA WALKER
Deputy Attorney General

Counsel for Amici States

Dated: December 8, 2004

(*Additional Counsel Listed on Inside Cover*)